LIBRARY
SUPREME COURT, U. S.

FILED
MAY 5 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~131~~ 5

October Term, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,

Appellants,

vs.

DOYLE CONNER, Commissioner of Agriculture of the State of Florida,

Appellee.

On Appeal From the United States District Court for the Northern District of Florida, Tallahassee Division

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS AND/OR AFFIRM

Wilton R. Miller
Resident Counsel
Florida Department of Agriculture
The Capitol
Tallahassee, Florida

Earl Faircloth
Attorney General
Robert A. Chastain
Assistant Attorney General
The Capitol
Tallahassee, Florida
32304

Attorneys for Appellee

TOPICAL INDEX

	Page
STATEMENT OF FACTS	2
OPINION BELOW	5
STATUTES INVOLVED	5
ARGUMENT	6
CONCLUSION	14

APPENDICES

APPENDIX A	A1
APPENDIX B	A8

TABLE OF CITATIONS

	page
Armour & Co. v. North Dakota, 240 U.S. 510 (1916)	13
Campbell v. Hussey, 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961)	12
Cloverleaf Butter Company v. Patterson 315 U.S. 148, 162, 86 L. Ed. 754, 62 S. Ct. 491	8
C. S. Smith Metropolitan Market v. Food and Grocery Bureau, 33 F. Supp. 539 (D.C.S.D. Cal., 1939)	12
Florida Avocado Growers v. Paul, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210	7, 9, 12
Greater New York Live Poultry v. United States, 47 F. 2d 156 (D.C.N.J., 1940), cert. den. 283 U.S. 837 (1930)	13
Schecter Poultry v. United States, 295 U.S. 495 (1935)	12, 13, 14
Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939)	12
Swift & Company v. Wikerson, 124 F. 2d 176 5th Cir., (1942)	13
Swift v. Wickham, 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258	6
Swift v. Wickham, 230 F. Supp. 398 (June 1964)	9
Swift and Co. v. Wickham, 364 F. 2d 241 (1966)	12
United States v. Food and Grocery Bureau, 43 F. Supp. 974 (D.C.S.D. Cal., 1942) aff'd 135 F. 2d 973 (9th Cir., 1944)	12
United States v. Matsumato, 45 F. Supp. 668 (D.C.S.D., Fla., 1942)	13
United States v. Independent Meat & Poultry Market, Inc., 32 F. Supp. 317 (D.C.N.J. 1940)	13, 14

page

United States v. Seligman, 86 F. Supp. 114 (D.C.W.D. Pa., 1949) 13

Veazey Drug v. Fleming, 42 F. Supp. 689 (D.C.W.D. Okl. 1941) 12

Winer v. United States, 228 F. 2d 944 (6th Cir., 1956), cert. den. 351 U.S. 906 (1956) 13

STATUTES

Federal Poultry and Poultry Products Inspection Act, 21 U.S.C.A., §§ 451-469 3, 5, 7, 8, 9, 12

Florida Poultry Law, Chapter 583, Florida Statutes, 1961 2, 4, 5, 12

28 U.S.C., § 2281 2, 6,

U.S. CONSTITUTION

14th Amendment 3, 6, 12

IN THE

SUPREME COURT OF THE UNITED STATES

No._____

October Term, 1966

CANTON POULTRY, INC., GEORGIA BROILERS CORPORATION, COTTON PRODUCERS ASSOCIATION, d/b/a GOLDKIST POULTRY GROWERS, INC., and TIP TOP POULTRY, INC.,

Appellants,

vs.

DOYLE CONNER, Commissioner of Agriculture of the State of Florida

Appellee.

On Appeal From the United States District Court for the Northern District of Florida, Tallahassee Division

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS AND/OR AFFIRM

MOTION TO DISMISS AND/OR AFFIRM

The appellee in the above styled cause moves to dismiss and/or affirm on the grounds that the appellants have improperly attempted to have this Court assume jurisdiction over the cause

and that the questions are so unsubstantial as not to need further argument.

STATEMENT OF FACTS

The appellants who are engaged in the business of processing poultry and poultry products for shipment and sale in interstate commerce, filed a complaint under 28 U.S.C. §2281 seeking to enjoin the appellee as Commissioner of Agriculture of the State of Florida from enforcing the Florida Poultry Law, Chapter 583, Florida Statutes, 1961, and the rules and regulations promulgated thereunder whereby the appellee requires an inspection fee and labeling of poultry and poultry products which, in accordance with Section 583.18 (4), Florida Statutes, shall be paid by the dealers of the State of Florida on all dressed poultry used in the preparation of food served to the public and which inspection fee shall be paid by the dealers who first sell and offer for sale or hold for the purpose of sale dressed poultry in the State of Florida, or by any person, firm or corporation using dressed poultry in the preparation of food served to the public on which an inspection fee has not been previously paid.

Chapter 583, Florida Statutes, 1961, and the rules and regulations promulgated thereunder clearly indicate that the law does not apply to any shipment of live or dressed poultry while the same constitutes a bona fide shipment in interstate commerce but does apply at the very instance when an interstate shipment comes to rest within the State of Florida, and the police power may then be asserted thereon, or at any time such interstate shipment loses its character as such. The appellant contended in the lower Court that the Florida Poultry Law as applied is unconstitutional because:

1. Under the supremacy clause it must be deemed preempted by the Federal Poultry and Poultry Products Inspection Act of 1947, 71 Stat. 441, 21 U.S.C.A. 451, et seq; and

2. Its application to the appellants' product denies the appellants equal protection of the laws in violation of the 14th Amendment of the U.S. Constitution; and

3. Its application to the appellants herein unreasonably burdens and discriminates against the interstate marketing of their products in the State of Florida in violation of the commerce clause of the U.S. Constitution.

The appellants in the presentation of proof and evidence in the lower Court were unable to show, in fact, that federal inspectors did make rounds of the storage warehouses or retail establishments where poultry is being stored or offered for sale in the State of Florida to look and see if the poultry, which at one time was inspected and found wholesome under the Federal Poultry and Poultry Products Inspection Act is still in that same wholesome condition. The Court during the trial of the case asked the following question, to wit:

> "Do the federal inspectors, without somebody calling them in, make the rounds of storage warehouses or retail establishments where poultry is being stored or offered for sale to look and see if the poultry which at one time was inspected and found wholesome is still in that wholesome condition?"

The record in this cause indicated that one man who is the U.S Department of Agriculture chief regulatory inspector for the State of Florida, along with six other southeastern states, to wit, North Carolina, South Carolina, Georgia, Tennessee, Alabama

and Mississippi, was responsible for regulatory inspection activities with the poultry division of the U.S. Department of Agriculture, and that he had available to assist him in the inspection activities under the Federal Poultry and Poultry Products Inspection Act the services of two other federal inspectors who are involved in the regulatory inspection activities of the State of Florida. These men are stationed in Tampa, Florida, and Thomasville, Georgia. The facts also evolved that the one man stationed in Tampa, Florida, was primarily responsible for egg inspections.

The facts and the evidence in this cause indicate that, on the other side of the ledger, the Poultry and Egg Division of the Florida Department of Agriculture conducted inspections under Chapter 583, Florida Statutes, and made 42,254 inspection calls at 9,913 retail stores and 200 wholesale outlets that distributed poultry to the retail stores in the State of Florida during the year 1964 alone.

Appellants also demonstrated through their witnesses and evidence that any poultry in Florida, discovered by federal inspectors to be contaminated, must actually be removed from public sale by stop-sale order issued under the provisions of the Florida Poultry Law. The federal inspectors, not having any stop-sale authority, must make application to the appellee's office for this authority.

On the other side of the ledger, the appellee has demonstrated that the regulatory inspection act under Chapter 583, Florida Statutes, was carried on by 46 state inspectors, all of whom are state of Florida personnel, and all of whom have the individual authority to issue stop-sale orders on any poultry products they find to be unwholesome. The facts and evidence demonstrated that the Florida Department of Agriculture, pursuant to the pro-

visions of Chapter 583, Florida Statutes, condemned approximately 76,800 pounds of poultry as unfit for human consumption between July 1, 1963, and July 1, 1965, and that approximately one-half this condemned poultry had been previously inspected by inspectors of the U.S. Department of Agriculture and shipped from without the State of Florida. The facts and the evidence also showed that about 90 per cent of Florida processed poultry is for intrastate consumption and therefore does not have federal inspection for wholesomeness.

The Court below issued its findings of fact and conclusions of law on January 25, 1967, and its final judgment on February 9, 1967, entering judgment in behalf of the defendant-appellee and against the plaintiffs-appellants.

This statement is submitted to show that the appellants in this cause have improperly attempted to have this Court assume jurisdiction over the cause and that the questions attempted to be presented herein are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court for the Northern District of Florida, Tallahassee Division, dated January 25, 1967, and the final judgment dated February 9, 1967, both unreported, are printed herein as Appendix A.

STATUTES INVOLVED

Federal Poultry and Poultry Products Inspection Act, 21 U.S.C.A., §§ 451-469.

Florida Poultry Law, Chapter 583, Florida Statutes, 1961.

ARGUMENT

I. THE APPELLANTS HAVE IMPROPERLY ATTEMPTED TO HAVE THIS COURT ASSUME JURISDICTION OVER THIS CAUSE:

In *Swift v. Wickham*, 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258, the Supreme Court dismissed an appeal for lack of jurisdiction involving questions of an amazingly similar parallel to the case at bar wherein plaintiffs in the *Wickham* case requested a three-judge court under 28 U.S.C., §2281, to enjoin the enforcement of a New York poultry inspection law on the ground that it would violate the commerce clause and the 14th Amendment of the Federal Constitution, and also because the overriding requirements of the federal law would violate the supremacy clause of the Constitution. In an opinion by the Honorable Justice Harlan expressing the views of six members of the Court, it was held that the commerce clause and 14th Amendment claims were too unsubstantial to support the jurisdiction of a three-judge court and that a suit to enjoin the enforcement of a state law solely on the grounds of a supremacy clause violation was not within the scope of 28 U.S.C., §2281.

Your appellee submits that this Court's *Wickham* decision was not rendered during the pendency of the trial but the case was decided on November 22, 1965, prior to the three-judge court in the instant cause entering its findings of fact and conclusions of law on January 25, 1967, and its final judgment on February 9, 1967. Your appellee therefore submits that the reasoning and application of the law in the *Swift* case, supra, would have application to the instant cause and this Court should dismiss the appeal for lack of jurisdiction.

II. THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL:

It is the contention of the appellants that Congress, by passage of 21 U.S.C.A., Section 451, et seq., which is known as the Poultry and Poultry Products Inspection Act, has preempted the field of regulation of poultry and poultry products so as to exclude regulations of poultry and poultry products under the Florida Poultry Law and such rules and regulations as may be adopted pursuant to said law.

It is a well established legal principle that the test of whether both federal and state laws and regulations may operate, or whether or not the state regulation must give way, is whether or not both regulations can be enforced without impairing the federal superintendence or there are different objectives involved. Federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210.

21 U.S.C.A., § 452, sets forth the congressional declaration of policy as follows:

> "It is declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food."

The Federal Poultry Law is primarily directed to a determination of the wholesomeness of poultry and poultry products and of their fitness for human consumption prior to its entry into the stream of interstate commerce. The Florida Poultry Law has as its purpose the upgrading of quality and standards of poultry products to provide housewives and consumers in Florida with identifiable and ascertainable grades of edible poultry products in order that they might know what they are purchasing and consuming and to promote and encourage the upgrading of quality and standards of all poultry and poultry products sold or produced in the State of Florida. The Florida law further provides that it is unlawful for any person to sell fowl, live or dressed, which is unsound, unhealthful, unwholesome, diseased or otherwise unfit for human consumption. The Florida law thus attempts to regulate poultry and poultry products within the state prior to their distribution to the consumers to assure them that poultry and poultry products which they purchase are not only fit for human consumption but of a quality which is ascertainable and identifiable.

It is well established that a state may, in the absence of an express contrary command of Congress, confiscate or exclude from the market products which have complied with all the Federal processing standards because of a higher standard demanded by the state for its consumers. A state regulation so purposed is permissible under all the authorities. *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148, 162, 86 L. Ed. 754, 62 S. Ct. 491, and cases therein collated.

In the instant case we have a Federal Poultry Act designed to prevent the entry of contaminated poultry products into the stream of interstate commerce, while the Florida law attempts to regulate the same products at the other end of the stream of

commerce in the same manner in which it regulates similar products which are solely intrastate in character. This Court held in the *Florida Avocado Growers* case that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end. . . ."

In *Swift v. Wickham*, 230 F. Supp. 398 (June 1964), the United States District Court, in and for the Southern District of New York, considered the question of whether or not the Federal Poultry and Poultry Products Act preempted the field of regulation of poultry products so as to oust weight regulation and labeling requirements promulgated under New York's Agricultural Markets Law. The court held that the Federal Act had not preempted the field. The court, in dealing with almost the identical issue that we have in the instant case, made the following observations:

> "We must first consider whether by the mere enactment of the Poultry Inspection Act, Congress so 'occupied the field' as to oust all weight regulation by states into which federally inspected poultry or poultry products are shipped, irrespective of the consistency of the state and federal regulation. Some illumination is afforded by a series of cases that arose shortly after enactment of the Pure Food and Drug Act. The first, Savage v. Jones, supra, held that the provisions of §8 prohibiting a package or label that contained false or misleading statements of the contents, 34 Stat. 768, 770 (1906), did not invalidate a state statute requiring a tab or label affirmatively disclosing the ingredients. . . .
>
> "Multiplication of references to Supreme Court decisions in this general area would serve no useful purpose; it suffices for the present to cite the last bracketing pair, both de-

cided by the narrowest of margins. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), sustained California's prohibition of the sale of avocados containing less than 8 per cent of oil by weight, as applied to Florida avocados whose maturity on picking was already controlled by compliance with regulations promulgated by the Secretary of Agriculture with special reference to Florida avocados, and which were certified by a Federal-State Inspection Service pursuant to regulations issued by the Secretary under the Agricultural Adjustment Act. 7 U.S.C. §§601 et seq., 48 Stat. 31 (1933). The Court reaffirmed that 'the principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained.' 373 U.S. at 142, 83 S. Ct. at 1217. As against this, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942), had prohibited Alabama from seizing packing stock butter, not meeting the state standard, which had been acquired by an Alabama processor for use in manufacturing renovated butter for transportation in interstate commerce under federal regulations, Internal Revenue Code of 1939, §§2320-27, 53 Stat. 252, The Florida Avocado Growers majority distinguished Cloverleaf on the basis that 'Congressional regulation at one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end,' 373 U.S. at 145, 83 S. Ct. at 1218, and pointed to the difference recognized in Cloverleaf 'between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities.' 315

U.S. at 162, 62 S. Ct. at 499. This distinction necessarily recognizes that it is not inevitably unconstitutional for a state desiring 'a higher standard' for the protection of its consumers to confront a manufacturer in another state with the alternatives of taking steps not required by applicable federal law or not selling his goods in the enacting state.

"The general scheme of the Poultry Products Inspection Act does not suggest a Congressional purpose to create an exclusive system of regulation of the marketing of poultry; in particular, it does not suggest an intent to oust the states of their historic undertaking to safeguard their people from improper statements of weight. The legislative findings, 21 U.S.C. §451, and the declaration of policy, 21 U.S.C. §452, speaking of the need for protection against unwholesome poultry products and of the importance of providing for inspection 'to prevent the movement in . . . commerce . . . of poultry products which are unwholesome, adulterated, or otherwise unfit . . .', do not carry the application that any of these objectives would be frustrated if the states were to impose supplemental regulations, at the end of the stream of commerce, to insure accomplishment of these ends—much less if the receiving states should further regulate a subject which the Federal Act touches so slightly as weights. While the Act contains the quoted provisions as to labeling, these are merely incidental to the primary provisions for inspection of poultry products . . . We conclude that the plaintiffs cannot prevail on their general argument as to federal occupation of the field."

In the *Swift* case, the very issue which is before the Court today was decided, and the District Court found that Congress had not preempted the field of regulating poultry and poultry prod-

ucts. In so doing the Court merely affirmed the principles set forth in the *Florida Avocado Growers* case.

In *Swift* the District Court also distinguished the Federal Poultry Act from the legislation at issue in *Campbell v. Hussey*, 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961), and stated that "there is a marked contrast with the importance attached in *Campbell v. Hussey* (citation), to the expressed intention to establish uniform standards in the *Tobacco Inspection Act*, 49 Stat. 731 (1935)."

The appellee believes that the *Swift* case is a correct interpretation of a long line of cases expressing the law of this country and that Congress, by passage of the Federal Poultry Act, has not preempted the field.

The lower Court's decision in the *Swift* case was affirmed in *Swift and Co. v. Wickham*, 364 F. 2d 241 (1966).

As to appellants' argument that the Florida Poultry Act, Chapter 583, Florida Statutes, 1961, has imposed a direct burden upon interstate commerce, your appellee urges that this proposition raises questions that are also unsubstantial.

The federal courts have consistently held that the Commerce Clause of the Federal Constitution does not extend to merchandise originating in interstate commerce after it comes to rest on the retail shelves for sale to the public. *Schechter Poultry v. United States*, 295 U.S. 495 (1935); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *C. S. Smith Metropolitan Market v. Food and Grocery Bureau*, 33 F. Supp. 539 (D.C.S.D. Cal. 1939); *United States v. Food and Grocery Bureau*, 43 F. Supp. 974 (D.C.S.D. Cal., 1942) (and cases cited therein at page 977), aff'd 139 F. 2d 973 (9th Cir., 1944); *Veazey Drug v. Fleming*, 42 F. Supp. 689 (D.C.W.D. Okl. 1941); *Armour & Co. v. North*

Dakota, 240 U.S. 510 (1916); *Winer v. United States*, 228 F. 2d 944 (6th Cir., 1956), cert. den. 351 U.S. 906 (1956); *United States v. Independent Meat and Poultry*, 32 F. Supp. 317; *Greater New York Live Poultry v. United States*, 47 F. 2d 156 (D.C.N.J., 1940), cert. den. 283 U.S. 837 (1930); *United States v. Seligman*, 86 F. Supp. 114 (D.C.W.D Pa., 1949); *United States v. Matsumato*, 45 F. Supp. 668 (D.C.S.D., Fla., 1942); *Swift & Company v. Wikerson*, 124 F. 2d 176 (5th Cir., 1942).

In *Schechter Poultry* v. *United States*, 295 U.S. 495 (1935), Mr. Chief Justice Hughes defined interstate commerce which is subject to congressional regulation. He stated at p. 543:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. See *Swift & Co.* v. *United States*, 196 U.S. 375, 387, 388; *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50,

55; *Stafford v. Wallace*, 258 U.S. 495, 519; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 35; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 439."

See also *United States* v. *Independent Meat & Poultry Market, Inc.*, 32 F. Supp. 317 (D.C.N. Jersey, 1940).

The rationale of the *Schechter Poultry* case, *supra*, is equally applicable to the case at bar. In the present case, the poultry comes into the state and is there held for local disposition. The poultry is not "destined for transportation to other states." The poultry is not introduced again into the stream of interstate commerce after it arrives in Florida, but, on the contrary, is used for local consumption and is distributed to retail stores in this state for that purpose.

CONCLUSION

The appellee respectfully urges this Court that the appellants have improperly attempted to have this Court assume jurisdiction over this cause and that the questions are so unsubstantial as not to need further argument.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

ROBERT A. CHASTAIN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellee